BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOEY PIERCE, Claimant, v. SCHOOL DISTRICT #21, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 02-524062** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 6, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Pocatello, Idaho, on April 14, 2005. Claimant was present and represented by Stephen B. Larsen of Pocatello. Steven R. Fuller of Preston, Idaho, represented Employer/Surety. Oral and documentary evidence was presented. The parties took no post-hearing depositions but submitted post-hearing briefs and this matter came under advisement on August 17, 2005.

ISSUES

By agreement of the parties, the issues to be decided are limited to:

1. Whether Defendant School District #21 was Claimant's statutory employer at the time of his industrial accident, and, if so,

2. Whether Claimant's employment was nonetheless exempt as casual labor.

CONTENTIONS OF THE PARTIES

Claimant contends his employment, by an uninsured independent roofing contractor hired by Defendant School District to repair a gymnasium roof, renders the district a statutory employer liable for injuries sustained by him when he fell from the roof.

Defendants contend that the School District was in the business of educating children, not repairing roofs, so the statutory employer doctrine does not apply. Further, even if the School District is found to be the statutory employer of Claimant, his claim must fail in any event because the need to repair roofs of buildings within their district is so sporadic and unpredictable that any repair work performed constitutes casual employment that is exempt from workers' compensation coverage.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, a co-worker, the School District's maintenance supervisor, and the School District's interim superintendent; and,

2. Defendants' Exhibit 1 admitted at hearing.

FINDINGS OF FACT AND DISCUSSON

1. Claimant was employed by an uninsured independent roofing contractor (Top Roofing Company, hereinafter TRC) that was hired by Defendant School District in the summer of 2002 to repair the roofs of various school buildings in Arimo, Idaho. Claimant was paid by TRC who, in turn, was paid by the School District per bid. On June 24, 2002, Claimant fell from the roof of the gymnasium building and was injured.

Idaho Code § 72-216(1) provides in pertinent part:

> An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied

> with the provisions of section 72-301 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.
> "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person *who is virtually the proprietor or operator of the business there carried on*, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is secured, it means his surety so far as applicable. Idaho Code § 72-102(12)(a). (Emphasis added).
>
> Generally, to find a business or person to be a statutory employer, the work being carried out by the independent contractor on the owner or proprietor's premises *must have been the type that could have been carried out by the employees of the owner or proprietor in the course of its usual trade or business*. *Harpole v. State*, 131 Idaho 437, 440, 958 P.2d 594, 597 (1998) citations omitted. (Emphasis added).

2. Lionel Ware, the School District's maintenance supervisor, testified at hearing that he chose TRC for the job because that company had repaired various roofs for the district in the 1980s with a product that Mr. Ware considered superior to others on the market.

3. Mr. Ware also testified that neither he, nor any other School District employee, supervised Claimant or TRC, nor were any School District employees roofers. Mr. Ware was only interested in the results of TRC's work, not the particulars or the timing thereof, so long as the roofing was completed before the fall school term began.

4. The School District did not supply any items of equipment other than a lift to place roofing material on a building at the time of his injury.

5. The business of the School District was to educate children, not to repair roofs.

6. The fact that the School District needed to provide a "roof over the heads" of its students is incidental to its charge of educating students. Otherwise, almost any repair, no matter how trivial, could theoretically invoke the statutory employer doctrine.

7. Defendants cite the Commission case of *Hodge v. Masar*, 2001 IIC 0218 (April 13, 2001), as authority for their position that the School District was not Claimant's statutory employer. In *Hodge*, the Defendant was a medical doctor with a medical and clerical staff who owned the premises or clinic in which he practiced. Dr. Masar contracted with a roofing contractor with whom he had previously done business to re-roof his clinic. The roofing contractor, in turn, hired claimant to work on the job. At intervals during the roofing job, Dr. Masar would inspect the work. Dr. Masar had some experience in roofing as he had re-roofed his personal residence. At some point, claimant fell off the roof and was injured; it was at that time that claimant learned that his direct employer had no workers' compensation insurance.

Relying on *Harpole*, *Id*., the Commission denied compensation on the ground that Dr. Masar was not a roofer or a general contractor. His employees were trained medical and clerical staff, they were not roofers. Dr. Masar did not own the tools necessary to place a roof on a building. Dr. Masar obtained pecuniary gain from his work as a physician, not from having his clinic roofed.

8. Here, as in *Hodge*, the School District and its staff were not roofers or general contractors. They were trained in the education of children. The School District did not have the tools required to put on a roof of any type, let alone the special product used by TRC. In sum, the School District was in the business of educating, not roofing; that is precisely why it hired TRC.

9. Claimant cites Idaho Supreme Court cases in support of his contention that he was the statutory employee of the School District. However, none of the cited cases are on point and are readily distinguishable from the case at bar.

10 The Referee finds that Defendant School District was not Claimant's statutory employer at the time of his accident and injury.

11. Based on the foregoing, the remaining issue is moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that Defendant School District #21 was his statutory employer at the time of his accident and injury.

2. The remaining issue is moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __26th ___ day of ___August___, 2005.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:
_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __6th ___ day of ___September___, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STEPHEN G LARSEN
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STEVEN R FULLER
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__/s/_____

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